# INDEX



## AUTHORITIES CITED

# In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

*v.*

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. Welch, and Charles M. Croft

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH*

## BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR

### OPINION BELOW

The opinion below appears at R. 29, and the judge's certificate at R. 53.

### STATEMENT OF THE CASE

On October 31, 1924, an indictment was filed in the United States District Court for the Central Division of the District of Utah against George A. Storrs, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, defendants, charging them in the

first count with a conspiracy to violate Section 215 of the Federal Penal Code, and in the second, third, and fourth counts with violations thereof. The conspiracy was alleged to have continued from November 15, 1919, to March 15, 1923. The violations of Section 215 were alleged in the second, third, and fourth counts, respectively, to have occurred on or before November 29, 1921, December 7, 1921, and December 9, 1921. (R. 1, 18, 21, 22, 23.)

On November 15, 1924, *before* the three-year statute of limitations had run on the violations of Section 215, defendants pleaded not guilty. (R. 25.) On February 24, 1925, *after* the statute had run, defendants were permitted to withdraw their pleas of not guilty and to plead in abatement. (R. 25.) These pleas were sustained in a judgment filed March 6, 1925 (R. 31), pursuant to an opinion filed on the same day (R. 29). The effect of the judgment was finally to bar the United States from further prosecution of the violations of Section 215.

One week after the entry of judgment the Government filed in the District Court a petition for rehearing. (R. 31.) This petition was entertained by the court over objection of the defendants, but was determined against the Government thirty-three days after the entry of the original judgment. (R. 31.) Fifteen days after the denial of the petition for rehearing and forty-eight days after the original judgment the Government petitioned for (R. 50) and was granted (R. 52) a writ of error.

## SUMMARY OF ARGUMENT

I. The judgment below sustaining the plea in abatement was in effect a bar to further prosecution because the statute had run. As such it came within the provision of the Criminal Appeals Act, and the Government is entitled to a writ of error. *United States* v. *Thompson,* 251 U. S. 407.

II. The writ of error was taken within thirty days after the denial of Government's petition for a rehearing, and was taken in time.

III. The writ of error should not be dismissed for want of diligent prosecution.

## ARGUMENT

### I

### THE JUDGMENT BELOW BARRED FURTHER PROSECUTION, AND WAS THEREFORE A PLEA IN BAR WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

The order granting the plea in abatement was entered more than three years after the commission of the indictable acts set out in counts two, three, and four. By reason of the running of the statute of limitations a new indictment could not be sought. Act of November 17, 1921, c. 124 (42 Stat. 220). The effect of the order was therefore to completely bar further prosecution for the crimes set out in counts two, three, and four.

The defendants pleaded in abatement, but the court's order in fact barred further prosecution. The type of plea was dilatory, but the effect of the judgment was final. The Government therefore

maintains that the case falls within the provisions and intent of the Criminal Appeals Act that a defendant shall not escape prosecution through an erroneous judgment of a trial court rendered before he has been placed in jeopardy.

This Court has had occasion to construe the authorization by the Act of March 2, 1907, c. 2564 (34 Stat. 1246), of a writ of error " from [a] decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," and has construed it with an eye not to form but to substance. *United States* v. *Barber,* 219 U. S. 72, 78; *United States* v. *Oppenheimer,* 242 U. S. 85. At page 87 of the opinion by Mr. Justice Holmes for the Court in the *Oppenheimer case* it is pointed out in regard to motions to quash and pleas in bar that "one judgment that he is free as matter of substantive law is as good as another."

The case of *United States* v. *Thompson,* 251 U. S. 407, is directly applicable to the case at bar. This Court sustained a writ of error to an order quashing an indictment on the ground that the grand jury proceedings had been irregular. A rehearing had been asked by the Government in the trial court, as in the case at bar, on the ground that the statute of limitations had already run. Upon denial of rehearing the writ of error was taken. The following quotation from the opinion of Chief Justice White is found at page 412, after citation of the *Barber* and *Oppenheimer cases:*

> Testing, then, the existence of jurisdiction by the substantial operation of the judgment * * * we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based * * *.

This is an express decision that, although the judgment below be not on a common-law plea in bar, it will constitute ground for a writ of error if its effect is in fact to bar further prosecution.

## II

### THE WRIT OF ERROR WAS TAKEN WITHIN THE TIME LIMIT ALLOWED BY STATUTE

The Act of March 2, 1907, requires that the writ of error shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Some question has arisen whether Section 8(a) of the Act of February 13, 1925, c. 229 (43 Stat. 936, 940), providing that writs of error and appeals to this Court shall not be entertained unless taken within three months after entry of judgment operates to enlarge the time specified in the Criminal

Appeals Act and other statutes relating to special appeals, but the correct view is that Congress did not intend to enlarge the time, and we do not contend otherwise.

The judgment in the instant case was rendered on March 6, 1925. (R. 31.) On March 13, 1925, a petition for rehearing was filed. It was entertained by the court against the objection of the defendants, the court holding that it had power to entertain the petition. (R. 31, 32.) The trial court denied the petition on April 8, 1925. (R. 31–32.) The writ of error was allowed April 23, 1925. (R. 50.) The writ was therefore taken within thirty days after the denial of a rehearing, although not within thirty days after the original judgment.

Movant does not deny that the running of the time for the taking of an appeal after a judgment has been entered is suspended by the due and seasonable filing and consideration of a proper motion for a rehearing, even though the granting of such motion rests within the sound discretion of the trial court.

*Andrews* v. *Virginian Railway Co.*, 248 U. S. 272.

*Southern Pacific Co.* v. *United States*, 270 U. S. 103.

*Morse* v. *United States*, 270 U. S. 151.

Movant contends, however, that trial courts at common law have no authority to grant rehearings in any case. He concedes that rehearings may be granted by both trial and appellate courts in equity

and by appellate courts at law, and that new trials may be granted by trial courts at law.

The short answer is that even if the action of the court in entertaining the petition for rehearing was error, it was not void for want of jurisdiction. The court had power to decide whether a petition for rehearing could be considered and whether its action was right or wrong, the fact that the petition was received, entertained, and not decided until April 8, suspended meanwhile the right to sue out a writ of error.

By Section 918 of the Revised Statutes District Courts are to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." The reconsideration during the term of an order, which through possible error might result only in useless and dilatory appeal, seems well within "the advancement of justice and the prevention of delays in proceedings."

Trial courts have, in fact, entertained similar motions in the past. In *United States* v. *Thompson*, *supra*, the court had granted a motion to quash the indictment, which this Court later held to be a plea in bar, and—

> A rehearing was asked on the ground, among others, that if the allowance of the motion to quash were adhered to, the result would be to bar the right of the Government to further prosecute for the offenses charged. * * * The rehearing was denied. (251 U. S. at p. 411.)

No suggestion was made that the District Court was not within its rights in entertaining the application for rehearing.

## III

### THE CAUSE SHOULD NOT BE DISMISSED FOR WANT OF DILIGENT PROSECUTION

This writ of error was docketed May 1, 1925 (R. 55), the writ having been allowed April 23, 1925. (R. 50.)

The case has taken its regular course since that time. On July 1, 1926, in accordance with the usual practice, the United States, at the request of the clerk, furnished him a requisition for printing the record.

The contention of defendants is in substance that there is want of diligence in prosecution, because the United States did not move to advance the cause out of its regular turn. Rule 18, paragraph 4, states:

> Criminal cases may be advanced by leave of the court on motion of *either* party.

The Solicitor General at the beginning of the October, 1925, Term took steps to have all criminal cases expedited by having it determined as soon as docketed whether they should be advanced. On December 28, 1925, this case was referred by the Solicitor General to the proper division in the Department of Justice "to determine whether the Government has a good case and should proceed

with the appeal and, if so, to make recommendation as to whether a motion to advance should not be made." Owing to a defect in our "follow-up" system, since corrected, no report was made on this reference, and the oversight was not discovered until late in the last term, when it was concluded that as the case would be well up on the 1926 Calendar no motion to advance was desirable.

While there has been failure by the United States to take the proper steps to expedite the hearing in this case, a failure to move to advance is no reason for dismissing the writ of error.

Respectfully submitted.

WILLIAM D. MITCHELL,
*Solicitor General.*
WILLIAM J. DONOVAN,
*Assistant to the Attorney General.*
WILLIAM D. WHITNEY,
*Special Assistant Attorney General.*

OCTOBER, 1926.

O